

CHAPTER 2: LEGISLATION AND POLICY

2.1 INTRODUCTION

The Department of Public Service and Administration supported the Department of Basic Education (DBE) in developing the Generic Functional Organisational structure for Provincial Education Departments (DoE Generic). The reason for this exercise was to develop consistency through norms and standards in organisational design in the public service.

The DoE Generic was developed taking into cognisance, the single policy statement for quality basic education in government and the National Treasury budget programme structure for funding purposes in the Basic Education Department. The resolution of the Council for Education Ministers was that the DPSA and DBE should assist provincial departments to align with the DoE Generic and also support its implementation. Eight out of nine provincial Education departments have committed to becoming aligned and some are in the process of concluding alignments.

The exception is the Eastern Cape Department of Education which was put under section 100 intervention in 2011 and an organisational review was conducted with the aim of aligning their structure to the Generic. The process never took off because of leadership challenges and their organisational structure has never consulted the DPSA for approval as outlined in the Public Service Regulations.

The Generic structure outlines the service delivery model for the curriculum and institutional support delivery within the education sector. It also articulates roles and responsibilities of all delivery layers (head office, districts and circuits) and the resourcing thereof.

2.2 APPLICABLE LEGISLATION

The procedure for the creation of posts, advertising, sifting, short listing recommendation of candidates and appointment is set out in various pieces of legislation. The following are applicable:

- The South African Schools Act (the SASA)³
- The Employment of Educators Act (the EEA)⁴
- The Personnel Administration Measures (the PAM)⁵
- The PPN Regulations⁶
- Regulations published under the name “*Regulations regarding the terms and conditions of employment of educators*”.

2.3 SCHOOLS AS JURISTIC PERSONS

- 2.3.1 Public schools are juristic persons.⁷ This means that a public school can obtain rights and incur obligations, enter into contracts, sue and be sued in its own name. A public school as a juristic person cannot manage and govern itself, and needs, a governance and management structure.
- 2.3.2 The governing body of a public school is the management and governance structure of such school.⁸ However a principal of a public school is responsible for the professional management of the public school.⁹ The professional management of the public school is done under the authority of the Head of Department (HOD)¹⁰. The principal is an employee of the HOD.¹¹ The governance of a public school is vested in its governing body which may perform only such functions and exercise only such rights as prescribed in the SASA.¹²

2.4 COMPOSITION OF SCHOOL GOVERNING BODIES

- 2.4.1 The membership of a governing body consists of the following three categories:
- a) elected members;
 - b) the principal in his or her official capacity;
 - c) co-opted members.¹³
- 2.4.2 The elected member category, is further made up of the following sub categories:

³ Act 84 of 1996.

⁴ Act 76 of 1998.

⁵ Published under GN 222 in GG 19767 of 18 February 1999.

⁶ Regulations published under the name “*Regulations for the Creation of Educator Post in a Provincial Department of Education and the Distribution of such Post to the Educational Institutions*”.

⁷ Section 15 of the SASA.

⁸ Section 16 of SASA.

⁹ Section 16(3) of the SASA.

¹⁰ Section 16(3) of SASA.

¹¹ Section 3(1)(b) of the EEA.

¹² Section 16(1) of the SASA.

¹³ Section 23(1) of the SASA.

- Parents of learners at the school. A parent who is employed at the school is excluded from this sub category.
- Educators at the school.
- Members of staff at the school who are not educators.
- Learners at the school who are in the eighth grade or higher.¹⁴

2.4.3 A governing body must elect office bearers from amongst its members which include a chairperson, treasurer and a secretary.¹⁵ Only a parent member who is not employed at the school may serve as the chairperson of the governing body.¹⁶

2.5 FUNCTIONS OF SCHOOL GOVERNING BODIES

2.5.1 A governing body has various and wide ranging functions and may also apply to the HOD to be granted additional functions.¹⁷

2.5.2 One of the functions of a governing body is to recommend the appointment of educators to the HOD.¹⁸ It should be noted that Section 20 of SASA allocates many further complex and profound functions to SGBs. The selection and recommendation of possible appointees to the school staff is but one such responsibility.

2.5.3 A governing body of a public school recommend to the HOD the appointment of educators and non-educator staff.¹⁹

2.5.4 A public school may establish posts for educators and employ educator staff additional to the establishment determined by the MEC in terms of the Educators Employment Act, 1994.²⁰

2.5.5 A public school may establish posts for non-educators and employ non-educator staff additional to the establishment in terms of the PSA.²¹

2.6 CREATION AND DISTRIBUTION OF EDUCATOR POSTS

2.6.1 The MEC creates educator posts for a provincial education department. The HOD must allocate such posts to public schools in his or her province.²² This process is further set out in detail in the PPN Regulations.

2.6.2 The MEC must determine the educator post establishment of a provincial education department in accordance with applicable policies and must take into account the

¹⁴ Section 23(2) of the SASA.

¹⁵ Section 29 of the SASA.

¹⁶ Section 29(2) of the SASA.

¹⁷ See section 20 and 21 of the SASA for functions of a governing body.

¹⁸ Section 20(1) of the SASA.

¹⁹ Section 20 (1)(f) and (g) of the SASA.

²⁰ Section 20 (4) of the SASA.

²¹ Section 20 (5) of the SASA.

²² Section 5 (1)(b) and 5(2) of the EEA.

budget of the department.²³ He or she must also consult with the education trade Unions.²⁴

- 2.6.3 The HOD allocates the posts, which have been determined by the MEC, to all public schools using the post distribution model and formula.²⁵

2.7 APPOINTMENT OF EDUCATORS IN TERMS OF THE PAM AND EEA

- 2.7.1 The appointment process starts when the Department advertises posts in the bulletin.²⁶
- 2.7.2 The District Office receives the applications and then sifts the applications. The sifting process in essence is an exercise to determine whether the applicants met the minimum requirements of the post such as for example registration with SACE.²⁷
- 2.7.3 The District Office will compile a list of applicants who met the minimum requirements.²⁸ This list will be submitted to the governing body who must shortlist candidates from this list.²⁹
- 2.7.4 The governing body must interview the candidates and must submit a list with the names of at least three recommended candidates in order of preference to the Head of Department. The governing body, in consultation with the HOD, may submit less than three names.
- 2.7.5 The Unions and the Departments are observers of the interview process though the Departmental representative is deemed a Resources Person who advises on procedure but should not influence decisions.
- 2.7.6 The Head of Department has the discretion to appoint a candidate from the SGBs list.³⁰
- 2.7.7 The issue of the discretion of the HOD to appoint has been the subject of litigation in a number of court cases. One of the lessons that one can take from these court

²³ Regulation 1(b) and(c) of the PPN Regulations.

²⁴ Regulation 1(c).

²⁵ As set out in annexure 1 of the regulations.

²⁶ The process of advertising of post is set out in detail in paragraph 3.1 of Chapter 3 of the PAM. The advertisement must be self-explanatory and clear and must include as a minimum the procedure to be followed for the application; names and telephone numbers of contact persons; preferable date of appointment and closing date for the receipt of applications and clearly state that the state is an affirmative action employer.

²⁷ Trade union parties must be provided with a report which must include the names of the educators who have met and those who have not met the minimum requirements-see Chapter 3, Paragraph 3.2(d) of the PAM.

²⁸ The minimum requirements are set out in chapter 2, paragraph 2.2 of the PAM. An educator must have a recognised three year qualification (REQV13) which must include appropriate training as an educator. No experience is required for appointment to a post level one post. Three to Nine years experience is required for appointment to post level 2-6 respectively.

²⁹ An Interview committee comprise of a departmental representative, the principal of the school, members of the governing body (excluding educators who are applicants for the post) and one education union representative. The union representative is an observer. See chapter 3 paragraph 3.3 of the PAM.

³⁰ This is however not an unfettered discretion and is, like any other administrative action, subject to the Constitution and the Promotion of Administrative Justice Act.

cases is that the HOD can deviate from appointing the preferred candidate of the public school, provided that the reasons for deviation are reasonable. One such reason for deviating from the recommendation of the governing body could be considerations of representivity and affirmative action.

2.7.8 The appointment process in respect of educators is set out in detail in the EEA and PAM.³¹

2.7.9 Section 6 of the EEA sets out the appointment process in detail.

2.7.10 The appointment process as set out in section 6 of the EEA can be summarized as follows:

- a) Appointments of educators to the provincial education department are made by the HOD.³²
- b) The appointment of educators can only be made on the recommendation of the governing body. However If there are educators who are in excess, then the governing body must recommend educators from candidates identified by the HOD as being in excess and suitable.³³
- c) The governing body must submit, to the HOD, a list of at least three names of recommended candidates in order of preference. The governing body must take into account the principles of representivity and equity.³⁴
- d) The HOD must also ensure that the governing body has met these requirements before making an appointment.³⁵He or she must decline making an appointment if the governing body has not met the requirements.³⁶
- e) The HOD has the discretion to appoint, or decline to appoint any of the suitable candidates on the list.³⁷
- f) . If the HOD declines to appoint any of the candidates on the list, then he or she must consider all the applications submitted for that post and appoint a suitable candidate temporarily or re-advertise the post.³⁸
- g) The governing body may appeal to the MEC against the decision of the HOD to appoint a temporary candidate, within 14 days after receiving the notification of the temporary appointment. The MEC must finalise the appeal within thirty days of receiving the appeal.³⁹

³¹ Section 6,6A,6B of the EEA and paragraphs 2 and 3 of chapter 3 of the PAM.

³² Section 6(1)(b) of the EEA.

³³ Section 6(3) of the EEA.

³⁴ Section 6(3)(a) and (b) of the EEA. These principles of equity and representivity are set out in section 7(1) of the EEA.

³⁵ Section 6(3)(d) of the EEA.

³⁶ Section 6(3)(e) of the EEA.

³⁷ Section 6(3)(f) of the EEA.

³⁸ Section 6(3)(g) of the EEA.

³⁹ Section 6(3)(h)-(k) of the EEA.

2.8 DELEGATION

- 2.8.1. The HOD may delegate or assign any of his or her powers conferred to him or her under the act to any person in the provincial department of education, on such conditions that the HOD may determine.⁴⁰

Analysis of current delegations frameworks reflects inconsistencies from province to province and recommendations to the Minister for Basic Education must be made in line with Cabinet approved 2013 Public Administration delegations framework and the DBE can assist in aligning these to the Education sector legislation should it be necessary.

- 2.8.2 Section 62 (1) of the SASA provides that the MEC may delegate any power conferred upon him/her to the Head of Department or an officer, accept except the power to publish a notice and the power to decide an appeal lodged with him or her in terms of the Act.
- 2.8.3 Section 62 (2) of the Act provides that the HOD may delegate any power conferred upon him/her to the Head of Department or an officer.

Clauses 2.8.2 and 2.8.3 above enable both the HOD and the MEC to delegate the appointments to any official in the department in terms of the Education Act. This requires greater checks and balances than at present to be built in the delegation's conditions and limitations column to ensure that delegations are properly executed. Furthermore, Section 6 of the Employment of Educators Act gives original powers to the HOD for appointments. The HOD may determine the levels of delegations in his or her Department. The SGB has no legal power to appoint, but can only recommend (Section 6 (3) (a)).

Having considered the above legislative prescripts, the Delegations Directive for the Public Services provides for transparency in the appointment process. The person that approves the shortlist and selection panel is not the person who makes the

⁴⁰ Section 36 (4)(a) of the EEA.

appointment. Hence, it is advisable for the HOD to maintain a central repository of suitable educators with clearly defined competencies which is devolved to District Offices for short listing.

2.9 FIRST APPOINTMENT OR APPOINTMENT AFTER BREAK IN SERVICE OF AN EDUCATOR

- 2.9.1 The EEA provides for an exception to the appointment process in respect of an educator who joins the department for the first time or after a break in service of one or more years.⁴¹
- 2.9.1 The Provincial Education Department may receive applications of first time applicants, or applicants returning after a break in service; process and match the applications to vacant post; and make appointments to a school.⁴²
- 2.9.2 The Provincial Education Department must however consult the relevant governing body on the specific post and the requirements thereof prior to the appointment of a candidate; ensure that the applicant to be appointed matches the requirements of the post and has the prescribed qualifications.⁴³

2.10 CONVERSION OF TEMPORARY EMPLOYMENT TO PERMANENT EMPLOYMENT

- 2.10.1 The HOD may convert a temporary educator appointment at a public school to a permanent educator appointment.⁴⁴
- 2.10.2 The HOD may only do the conversion after he or she had consulted the relevant governing body.

2.11 POLICY ON THE SOUTH AFRICAN STANDARD FOR PRINCIPALSHIP

- 2.11.1 The Department recently published the policy on standards for principalship. The policy is intended to serve the following purpose:
- The establishment of a clear understanding of what the education system expects of those leading and managing its schools;
 - Providing clearly defined roles of principals and the key aspects of professionalism and expertise required in such positions;

⁴¹ This is set out in section 6A of the EEA.

⁴² Section 6A(1) of the EEA.

⁴³ Section 6A(2) of the EEA.

⁴⁴ Section 6B of the EEA.

- Providing information to all stakeholders in education about what is expected of a principal;
- Serving as a template against which professional leadership and management development needs may be addressed;
- Informing better recruitment and selection procedures;
- Providing the basis for improved performance management processes applicable to principals;
- Being used by principals to identify their personal professional development needs throughout their careers;
- Guiding those aspiring to be principals on what is expected of a school principal; and
- Enhancing and sustaining the image, professionalism and core competencies of school principals.

2.11.2 The policy also clearly sets out what is expected from principals in terms of strategic, executive, instructional, cultural and organizational leadership.

2.11.3 The policy is intended to improve the management capacity of principals, thereby creating conducive environment for learners to improve learning outcomes.

2.11.4 Provincial Education Departments, Districts and Circuits should benefit on the guidance in the policy to recruit and appoint a suitable principal within the context of the school where the post is vacant. These offices would be able to use policy to hold principals accountable as they monitor and support schools in performing their roles and responsibilities.

2.11.5 The policy will assist in preparation of aspirant principals with the career path of leadership and management they have selected, in managing the schools for which they apply for principalship. It will assist appointed principals to lead and manage their schools in such a manner that all learners can achieve according to their ability and he/she will guide teachers to deliver quality teaching.

2.11.6 The Policy will assist School Governing Bodies with recruitment, selection and recommendation for appointment of principals in schools including how governing bodies should work with principals in governing schools.

2.12 BASIC EDUCATION LAWS AMENDMENT BILL

2.12.1 The Department appointed a Task Team to review all education legislation. The Task Team drafted the Basic Education Laws Amendment Bill. The Bill has been approved by the CEM and HEDCOM for publication for comments.

2.12.2 The Draft Basic Education Laws Amendment Bill, 2014 (the Draft Amendment Bill) proposes to amend the South African Schools Act, 1996 (Act No. 84 of 1996), and the Employment of Educators Act, 1998 (Act No. 76 of 1998) (the SASA and the EEA, respectively), so as to align it with developments in the education landscape, and to ensure that systems of learning and excellence in education are put in place in a manner which respects, protects, promotes and fulfils the right to basic education enshrined in section 29(1) of the Constitution of the Republic of South Africa, 1996. The Draft Amendment Bill seeks to amend the SASA and the EEA so as to make certain technical and substantive adjustments, to clarify certain existing provisions and to insert certain provisions to cover matters which are not provided for in the existing legislation.

2.12.3 Clause 10 seeks to amend section 20 of SASA by limiting the powers of a governing body to recommend to the Head of Department the appointment of only post level 1 educators, having the effect that the selection and appointment of post levels 2 to 4 educators will be the sole responsibility of the Head of Department of the province.

2.12.4 Clause 32 seeks to amend section 6 of the EEA to provide for a limitation on the post levels recommended by the governing body to the Head of Department. Any appointment, promotion or transfer to any promotional post levels 2 to 4 on the educator establishment of a public school are to be determined from candidates identified by the Head of Department and educators on these post levels will be appointed directly by the Head of Department.

2.13 THREATS TO THE current APPOINTMENT PROCESS

- 2.13.1 The system as set out in the legislative framework relies to a large extent on there being a functional governing body with governing body members who have the necessary skills or who have access to persons with the necessary skills that can conduct the interviewing process.
- 2.13.2 There are over twenty four thousand public schools in the country. There could therefore theoretically be the same number of selection panels. Many public schools do not have functional governing bodies and persons with the necessary skills to conduct interview processes especially in deep rural areas. The interviewing process requires persons with knowledge of curriculum statements, management processes and the content knowledge of subjects. In many instances the selection panels do not know what is required of a principal, deputy principal or HOD.
- 2.13.3 In such instances the selection panel relies to a large extent on the principal or Union representatives for guidance. In most cases the principal serves as the Resource Person of the Department when interviews are conducted for deputy principal and HOD posts leaving the process open to manipulation.
- 2.13.4 The function to recommend candidates for appointment and other wide ranging functions that governing bodies must perform was provided to governing bodies based upon the premise of a governing body having the necessary capacity to perform these functions. The following statement is made in paragraph 4.2 of White Paper 2:
- “The new arrangement and governance system, to say nothing of new funding arrangements, involve a radical decentralization of management and governance responsibilities to local schools and communities. It is no exaggeration to say that decentralization and democratization will not succeed- that is, they will be incapable of stimulating and supporting the regeneration of the culture of teaching and learning and enhancing the quality of educational delivery and performance-unless managers and governing bodies are able to understand and perform their tasks competently and in co-operation with each other.”*
- 2.13.5 It is also stated in that White Paper that Provincial Education Departments should ensure effective in service programmes and that District Offices provide

professional leadership and support to school principals, teachers and governing bodies and monitor their development, and identify local priorities for resourcing.

2.13.6 It is clear that Districts have NOT supported SGBs to the extent that is required.

Many district directors indicated that they do not have the necessary resources to provide effective support to governing bodies. Ideally the district should provide a subject advisor and circuit manager to interview committees.

2.13.7 It should be noted that HODs are restricted in terms of who they may appoint.

Although the HOD has in terms of the legislation a discretion on who to appoint, such appointment can be challenged by governing bodies especially if the HOD does not appoint the preferred candidate of the governing body. The HOD has to justify his/her decision to deviate from the recommendation of the governing body and has to provide good reasons that stand up to legal scrutiny in the courts. The reason for this is that the appointment process is seen as administrative action in terms of the Promotion of Administrative Justice Act. In terms of that Act the person exercising the discretion or taking the administrative action has to do so in terms of the principles as set out in that Act. Administrative action can be taken on review if it is viewed as unjust or unreasonable.

2.13.7 Educators form part of the interview committee of a governing body. It is therefore conceivable that an educator could be in a position to recommend the appointment of his/her supervisor.

2.13.8 The HOD as the employer of educators does not have a say in the short listing of his/her employees.

2.13.9 The minimum requirements as set out paragraph 2.2 of the PAM does not require any management experience for promotion appointments such as Deputy Principal and Principal. A post level one educator may become a principal or Deputy Principal.